

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. JOSE AGOSTO,

APPELLANT,

-vs-

HONORABLE HOLLIE GALLAGHER, et al.,

APPELLEES.

Case No. 2011-1604

On Appeal from the
Cuyahoga County Court
Of Appeals, Eighth
Appellate District

MERIT BRIEF OF APPELLEES

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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

On October 21, 2005, a jury found Appellant Jose Agosto guilty of murder in violation of R.C. 2903.02 (count 2) and felonious assault in violation of R.C. 2903.11 (count 3) in Cuyahoga County Court of Common Pleas case number CR-455886-A. Count 1 was nolle. Counts 2 and 3 were merged for sentencing. Agosto was subsequently sentenced to 15 years to life to be served consecutively to the sentences in case numbers CR-422860 and CR-442256.

Agosto's convictions were affirmed on appeal. *State v. Agosto*, Cuyahoga App. No. 87283, 2006-Ohio-5011, appeal not allowed by *State v. Agosto*, 114 Ohio St.3d 1414, 2007-Ohio-2632. Agosto filed an application for reopening that was denied by the Eighth District Court of Appeals. *State v. Agosto*, Cuyahoga App. No. 87283, 2007-Ohio-848, appeal not allowed by *State v. Agosto*, 114 Ohio St.3d 1414, 2007-Ohio-2632.

On April 14, 2011, Agosto filed a petition for writ of mandamus and/or procedendo ("Petition") in the Eighth District Court of Appeals in which he claimed that: (1) the trial court failed to properly apply the mandates set forth in R.C. 2941.25(A) regarding allied offenses; and (2) the trial court did not properly impose postrelease control.

On September 2, 2011, the Eighth District Court granted Appellees' motion for summary judgment and denied Appellant's Petition. *State ex rel. Agosto v. Gallagher*, Cuyahoga App. No. 96670, 2011-Ohio-4514.

Agosto has filed an appeal of the Eighth District Court's judgment denying Appellant's Petition as a matter of right that is before this Court.

II. LAW AND ARGUMENT

Proposition of Law: The Court of Appeals erred in dismissing Relator's Complaint/Petition for Writs of Mandamus and/or Procedendo to correct Relator's Sentence that is contrary to law pursuant to R.C. 2941.25(A) that the trial court had a mandatory duty to comply with the provisions thereof, violating Relator's constitutional guarantee against double jeopardy. The trial court also improperly imposed post-release control.

Agosto claims the Eighth District Court of Appeals erred in dismissing his petition for writ of mandamus and/or procedendo. More specifically, he contends the appellee Judge Gallagher did not properly address the issue of allied offenses at sentencing and improperly imposed postrelease control, and therefore his sentence is void. Agosto's claim is without merit. Agosto's Petition was properly dismissed by the Eighth District Court because it is defective and Agosto has no a clear legal right to the writ.

A. Appellant's Petition is defective

The local rules of the Eighth District Court of Appeals require that extraordinary writs contain an affidavit specifying the details of the claim. "All complaints must contain the specific statements of fact upon which the claim of illegality is based and must be supported by an affidavit from the plaintiff or relator specifying the details of the claim. Absent such detail and attachments, the complaint is subject to dismissal." Local App.R. 45(B)(1)(a).

Agosto attached an affidavit to his Petition in which he indicates that "... the claims, statements, and allegations, as set forth in paragraphs 1 through 11 made therein, are true and correct to the best of my knowledge, recollection, and belief." This statement fails to specify the details of Relator's claims as required by Local App.R. 45(B)(1)(a). *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas*, 123 Ohio St.3d 124, 2009-Ohio-4688 (Court denied petition for writ of mandamus and procedendo since appellant failed to comply with Local

App.R. 45(B)(1)(a) when he merely stated in his affidavit that his complaint was “true and correct to the best of his knowledge, recollection, and belief”).

This Court has recognized that a violation of Local App.R. 45(B)(1)(a) of the Eighth District Court of Appeals warrants a dismissal of an action for an extraordinary writ. See *State ex rel. Boccuzzi*, 112 Ohio St.3d 438, 860 N.E.2d 749, 2007-Ohio-323, ¶ 19 (appellants’ conclusory allegations of abuse of discretion, bad faith, conflict of interest, self-interest, and self-dealing by Cuyahoga County Board of Commissioners in their complaint for writ of mandamus were insufficient to withstand dismissal under Local App.R. 45(B)(1)(a)); *State ex rel. White v. Suster*, 95 Ohio St.3d 465, 768 N.E.2d 1178, 2002-Ohio-2482, ¶ 2 (even assuming Appellant was correct that mandamus was appropriate to compel a judge to enter a specific judgment, he would still not be entitled to reversal based upon his failure to comply with Loc.App.R 45(B)(1)(a)).

Therefore, the decision of the Eighth District Court of Appeals to grant Appellees’ motion for summary judgment to Appellant’s Petition should be affirmed.

B. Appellant has no clear legal right to the writ

The requirements for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118.

Furthermore, a writ of mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176 (overruled on other grounds); *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55; *State ex rel. Pressley v. Industrial Commission of Ohio*

(1967), 11 Ohio St.2d 141, paragraph three of the syllabus. Moreover, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108; *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga County* (1990), 56 Ohio St.3d 33.

Also well-established are the criteria for relief in procedendo. The relator must demonstrate: (1) a clear legal right to proceed in the underlying matter; and (2) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Weiss v. Hoover* (1999), 84 Ohio St.3d 530, 531-532; see, e.g., *State ex rel. Charvat v. Frye*, 114 Ohio St. 3d 76, 2007-Ohio-2882, at ¶ 13. A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, at ¶ 13. In addition, a writ of procedendo cannot be used to control judicial discretion, even if that discretion is abused. *State ex rel. George v. Burnside*, 118 Ohio St.3d 406, 2008-Ohio-2702, ¶ 7.

Agosto failed to establish that he has a clear legal right to the requested relief, that Appellee Judge Gallagher has a clear legal duty to perform the requested relief, that he had or has no adequate remedy at law, or that Appellee Judge Gallagher has refused to render a judgment or has unnecessarily delayed proceeding to judgment.

Agosto claims that he was convicted of allied offenses in violation of the Double Jeopardy Clause of the United States Constitution. But Agosto is not entitled to a remedy by way of extraordinary writ based upon allegations that he was convicted of allied offenses since he has or had adequate remedies at law to raise these claims. *State ex rel. Martin v. Russo*, ___ Ohio St.3d. ___, 2011-Ohio-5516 (slip opinion) (allied-offense claims were not cognizable in an

action for an extraordinary writ because defendant had an adequate remedy by appeal to raise these claims); *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, at ¶ 10 (allied offenses are non-jurisdictional and are not cognizable in habeas corpus). Since Agosto had or has adequate remedies at law to raise his claim that he was convicted of allied offenses he is not entitled to a remedy by way of mandamus or procedendo. Therefore, the Eighth District Court correctly denied Appellant's Petition. *State ex rel. Agosto v. Gallagher*, Cuyahoga App. No. 96670, 2011-Ohio-4514, ¶ 9.

Moreover, Agosto's claim that the Eighth District Court erred when it denied his claim that he was entitled to be resentenced due to the trial court's alleged improper imposition of postrelease control is without merit. In his Petition Agosto claimed that he must be conveyed back to Cuyahoga County Court of Common Pleas because the trial court improperly imposed postrelease control. However, the sentencing journal entry issued by the trial judge on November 3, 2005, in Cuyahoga County Court of Common Pleas case number CR-04-455886-A indicates that "post release control is a part of this prison sentence for the maximum time allowed for the above felony(s) under R.C. 2967.28". (See Appellees' MSJ to Petition, Ex. A).

Because Agosto was notified at the time of his sentencing that postrelease control was imposed he had sufficient notice to raise any claims concerning the trial court's possible imposition of postrelease control by way of direct appeal. In *Patterson v. Ohio Adult Parole Authority*, 120 Ohio St.3d 311, 2008-Ohio-6147, the Supreme Court of Ohio held that claims concerning errors in the imposition of postrelease control cannot be raised by extraordinary writ when the sentencing entry includes postrelease control, "however inartfully it might be phrased". *Id.* at ¶ 8.

In *Patterson* petitioner sought a writ of habeas corpus to compel the Ohio Adult Parole Authority to terminate his post-release control on the basis that he was improperly informed at his sentencing hearing that he might be subject to post-release control. The Supreme Court in *Patterson* held that because petitioner had an adequate remedy by way of direct appeal from his sentence to raise his claim that he did not receive proper notification of post-release control, he was not entitled to a remedy by way of writ of habeas corpus. *Id.* at ¶ 8; *see also Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, at ¶ 51 (court denied petition for writ of habeas corpus since any challenge to propriety of the sentencing court's imposition of post-release control in the entries could have been raised on appeal.).

In addition, the Supreme Court of Ohio in *State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas*, 125 Ohio St.3d 402, held that that a sentencing entry that sufficiently included language that postrelease control was part of his sentence afforded appellant sufficient notice to raise any claimed errors on appeal rather than by extraordinary writ. See also *State ex rel. Tucker v. Forchione*, 128 Ohio St.3d 298 , 2010-Ohio-6291, at ¶ 1 (appellant's sentencing entry sufficiently included language that postrelease control was part of his sentence so as to afford him sufficient notice to raise any claimed errors on appeal rather than by extraordinary writ).

Since the trial court's sentencing journal entry in Cuyahoga County Common Pleas case number CR-04-455886 provided Agosto with sufficient notice that postrelease control had been imposed, Agosto could have raised his claims concerning any errors in the imposition of postrelease control on direct appeal and therefore cannot raise these claims by extraordinary writ. Consequently, the Eighth District Court was correct when it held that Agosto had an adequate remedy by way of appeal to raise claims that the trial court improperly imposed postrelease

control. *State ex rel. Agosto v. Gallagher*, Cuyahoga App. No. 96670, 2011-Ohio-4514, ¶ 10.
As a result, Agosto is not entitled to a remedy by way of writ of mandamus and/or procedendo.

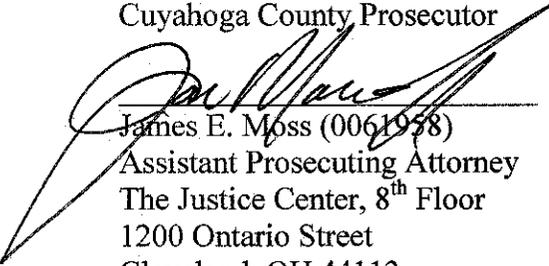
Therefore, the decision of the Eighth District Court of Appeals to grant Appellees' motion for summary judgment to Appellant's Petition should be affirmed.

III. CONCLUSION

For the foregoing reasons, Appellees Judge Hollie Gallagher and the Cuyahoga Court of Common Pleas respectfully request that this Honorable Court affirm the judgment of the Eighth District Court of Appeals denying Appellant's Petition for Writ of Mandamus and/or Procedendo.

Respectfully submitted,

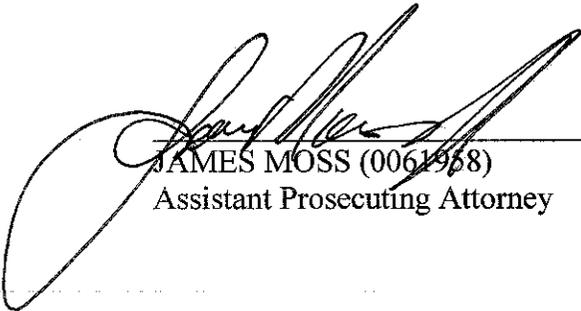
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IV. CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellees was sent this 18th day of November, 2011, by regular U.S. Mail to Jose Agosto, Pro Se, Inmate # 493-626, at Mansfield Correctional Institution, P.O. Box 788, 1150 North Main Street, Mansfield, Ohio 44901.



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